

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION**  
**OF SOUTH CAROLINA**  
**DOCKET NO. 2020-218-E**

In the Matter of:	)	
	)	
Alex Kadoshnikov,	)	
Complainant/Petitioner,	)	
	)	<b>DUKE ENERGY CAROLINAS, LLC’S</b>
v.	)	<b>PETITION FOR RECONSIDERATION</b>
	)	
Duke Energy Carolinas, LLC,	)	
Defendant/Respondent.	)	
	)	

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Pursuant to S.C. Code Ann. § 58-27-2150 and S.C. Code Ann. Regs. 103-825(A)(4), Duke Energy Carolinas, LLC (the “Company”) requests that the Public Service Commission of South Carolina (the “Commission”) reconsider its denial of the Company’s Motion to Dismiss the Complaint in Order No. 2020-753 issued in the above-referenced docket and served on the Company on December 22, 2020. Order No. 2020-753 should be reconsidered because: (1) the Company’s defense of *res judicata* is a distinct, independent ground for dismissal of the Complaint, and the Commission must affirmatively rule on this defense; and (2) whether Complainant’s meter can be relocated is not at issue in this case, and the Commission’s finding that whether the meter can be relocated creates an issue of fact is an error of law.

**I. Background**

In Docket No. 2018-124-E on April 5, 2018, Mr. Kadoshnikov filed a complaint alleging unspecified health risks associated with smart meters and opposing the Commission-approved fees required by the Company’s Manually Read Meter (“MRM”) Rider. Mr. Kadoshnikov also filed

an Amended Complaint in Docket No. 2018-124-E, adding unspecified concerns with meter data security. DEC filed, and served upon the parties of record, a motion to dismiss the prior complaint. On September 19, 2018, the Commission issued Order No. 2018-625 dismissing Mr. Kadoshnikov's Complaint in Docket No 2018-124-E. Mr. Kadoshnikov filed a Petition for Reconsideration of Order 2018-625 and on December 20, 2018, the Commission issued Order No. 2018-838 denying the Petition for Reconsideration. In the instant proceeding, Mr. Kadoshnikov filed another Complaint, again alleging unspecified health risks associated with smart meters. On October 2, 2020, the Company filed an Answer and Motion to Dismiss. The Commission denied the Company's Motion to Dismiss in Order No. 2020-753, finding that Mr. Kadoshnikov's suggestion in the Complaint that his meter could be relocated created a question of fact that must be addressed by the Commission, and that the Commission therefore "need not" address the Company's *res judicata* argument.

**II. The Complaint is barred by the doctrine of *res judicata*, and such defense must be affirmatively ruled upon by the Commission.**

The Company's defense of *res judicata* is a distinct, independent ground for dismissal of the Complaint, and the Commission must affirmatively rule on this defense. The basis of the Complaint filed in this case is unspecified health risks associated with smart meters. This is the same basis for the Complaint filed by Mr. Kadoshnikov in Docket No. 2018-124-E, which was dismissed on the merits by Order No. 2018-625 on September 18, 2018. In the order denying the Company's motion in the present case, the Commission recited the applicable law as follows:

The legal doctrine of *res judicata* bars subsequent litigation between identical parties where the claims arise out of the same transaction or occurrence that was the subject of the prior litigation between those same parties. *Sub-Zero Freezer Co. v. R.L. Clarkson Co.*, 308 S.C. 188, 417 S.E.2d 569 (1992). This doctrine also bars litigants from raising any issues which might have been raised in the prior action. *Hilton Head Ctr. Of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 362 S.E.2d 176 (1987).

Order No. 2020-753 at 5, Docket No. 2020-218-E (Dec. 22, 2020). Nevertheless, the Commission thereafter found that, because it had denied the Company's Motion to Dismiss on one ground, it did not need to address the doctrine of *res judicata*.

*Res judicata* is an independent defense properly pled by the Company in this case that must be affirmatively considered by the Commission, and the finding that the Commission did not need to address it is an error of law. *See Fontaine v. Peitz*, 291 S.C. 536, 539, 354 S.E.2d 565, 567 (1987) ("Where a court is clothed with discretion, but rules as a matter of law, the appealing party is entitled to have the matter reconsidered and passed on as a discretionary matter."). The Complaint in this case is barred by the doctrine of *res judicata* inasmuch as the claims arise out of the same issue, and any issues raised in the instant Complaint "might have been raised in the prior action." For that reason, the Complaint should be dismissed.

### **III. Whether Complainant's meter can be relocated is not at issue in this case.**

Whether Complainant's meter can be relocated is not at issue in this case, and the Commission's finding that whether the meter can be relocated creates an issue of fact is an error of law. SCRCP 12(b)(6) provides that a Complaint may be dismissed if it fails to "state facts sufficient to constitute a cause of action." "A ruling on a 12(b)(6) motion to dismiss for failure to state a claim must be based solely upon allegations set forth on the face of a complaint." *State Bd. of Med. Examiners of S.C. v. Fenwick Hall, Inc.*, 300 S.C. 274, 276, 387 S.E.2d 458, 459 (1990) (emphasis added) (*Nelson*). Mr. Kadoshnikov's mere positing on the Complaint form that DEC could relocate the meter to a pole does not constitute an "allegation" as required by *Nelson* or a "fact sufficient to constitute a cause of action" as required by SCRCP 12(b)(6). Supporting this view is the fact that the meter relocation notion is mentioned as part of the "Relief Requested" section of the Complaint form, not as part of the "Concise Statement of Facts/Complaint." If the

Complaint had alleged, for example, that the Company had refused to relocate the meter, Mr. Kadoshnikov might be entitled to relief. The Complaint, however, does not make this allegation. In fact, the Company *has* offered to relocate Mr. Kadoshnikov's meter, and he declined to pursue that option. Irrespective of these facts, the allegations in the Complaint do not constitute a valid cause of action before this Commission. For these reasons, the Motion to Dismiss the Complaint should be granted.

### **CONCLUSION**

Order No. 2020-753 should be reconsidered because: (1) the Company's defense of *res judicata* is a distinct, independent ground for dismissal of the Complaint, and the Commission must affirmatively rule on this defense; and (2) whether Complainant's meter can be relocated is not at issue in this case, and the Commission's finding that whether the meter can be relocated creates an issue of fact is an error of law.

Respectfully submitted this 31<sup>st</sup> day of December, 2020.

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